

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION NO.3149 OF 2006

Cartini India Ltd.
(Formerly, Godrej Appliances Ltd.)
Mumbai .. Petitioner
V/s
Asst.Commissioner of Income Tax
10(2) Mumbai & Ors. .. Respondents

Mr.P.Pardiwala with Mr.Jitendra Jain and Mr.A.K.Jasani
for the Petitioner.

Mr.Vimal Gupta for the Respondents.

**CORAM : DR.S.RADHAKRISHNAN &
J.P.DEVADHAR, JJ.**

**DATE OF RESERVING JUDGMENT : 05.02.2007
DATE OF PRONOUNCEMENT OF JUDGMENT : 28.02.2007**

JUDGMENT: (PER DR.S.RADHAKRISHNAN, J.)

1. Rule. Rule is made returnable forthwith. By consent of parties, petition is taken up for hearing. The Petitioner has filed the present petition to challenge the issue of the notice dated 13th March, 2006 under Section 148 of the Income Tax Act, 1961 (hereinafter referred to as "the said Act") for the assessment year 1999-2000 by the Assistant Commissioner of Income Tax, for reopening of assessment.

2. The facts in support of the petition are as follows:

. The Petitioner is a company engaged in the business of manufacturing and marketing of refrigerators, air-conditioners and washing machines. Respondent No.1

is the Assistant Commissioner of Income Tax assessing the Petitioner and Respondent No.2 is the Commissioner of Income Tax having jurisdiction over the Petitioner under the Act. For the assessment year 1999-2000, the Petitioner had filed its return of Income on 31st December, 1999. In the returns filed the Petitioner had disclosed in its note No.5(b) that the excise duty paid amounting to Rs.7.92 crores in respect of the inventories of finished goods had been treated as a pre-payment and included other advances which were treated as a fiscal levy on manufacture and not as an element of manufacturing cost for the purpose of valuation of such inventories. The petitioner had not debited the Profit and Loss account of this amount and therefore had not claimed any deductions either in account or in the computation of income.

. In the annual accounts the Petitioner in his note No.9(b) had disclosed:

(a) that the company had discovered some fraudulent invoicing by a transporter during 1997-98 and 1998-99, a part of which was recovered &

(b) that the remaining amount aggregating to Rs.1.55 crores for the current year and the preceding years were not recoverable and hence had been written off in the Profit & Loss account in the respective years.

. In the Company's Tax Audit Report the Petitioner had disclosed:

(a) a sum of Rs.59.88 lakhs which was recovered, on account of criminal & civil proceedings, as the excess amount billed by the transporters and the same was made chargeable to tax under section 41 of the Act &

(b) the details of the effect on the valuation prescribed under section 145A of the Act, and thereon the profit and loss.

. On 14th March, 2002, the Assessing Officer after considering all material facts relating to the scrutiny assessment queries, completed the assessment u/s.143(3) of the Income Tax Act.

. The order of the Assessing Officer stated that the MODVAT balance of Rs.3,37,51,671/- represented an amount which pertained to the cost of purchase and hence had to be added to the valuation of the closing stock.

3. Being aggrieved by the said order, the Petitioner preferred an appeal to the Commissioner of Income Tax

(Appeals). The Commissioner of Income Tax (Appeals) deleted the addition made by the Assessing Officer, by his order dated 14th October, 2002. Aggrieved by the said order of the Commissioner of Income Tax (Appeals), the Department and the Petitioner had filed cross appeals before the Income Tax Appellate Tribunal. The Tribunal partly allowed both appeals. The Petitioner was called upon to reply to the audit objections on 10th January, 2005, which finds its place in the reasons recorded for reopening the assessment. The Tribunal had in detail discussed the issue of section 145A of the Act, and held that if MODVAT is not included then the Assessing Officer will include the same without disturbing their opening stock. Thereafter on 17th March, 2006, the Petitioner received a notice dated 13th March, 2006, under section 148 of the said Act whereby the Respondents sought to reopen/reassess the completed assessment for Assessment Year 1999-2000. The Petitioner thereafter requested the respondent to forward their reasons for reopening of the assessment vide a letter dated 12th April, 2006. On 18th May, 2006 Respondent No.1 issued a notice under Section 143(2) and also furnished reasons for reopening the assessment to which the Petitioner had filed its objections on 1st June, 2006. Respondent No.1 rejected the objections of the Petitioner vide an order dated 9th November, 2006 for proceeding with the reassessment proceedings. On being aggrieved by this order, the Petitioner was

constrained to file this Petition.

4. Mr.Pardiwalla, the learned Counsel for the Petitioner had submitted on the basis of the above mentioned facts, that the impugned notice dated 13th March, 2006 under section 148 of the Act, to reopen the assessment for the assessment year 1999-2000 is invalid, improper, without jurisdiction, time barred and without proper sanction under Section 151 of the Act and is therefore liable to be quashed and set aside as bad in law. In support of this the learned Counsel for the Petitioner submitted that it is a well settled principle of law that the existence of a valid "reason to believe" is a sine qua non to exercise the jurisdiction under Section 147 of the said Act, which provides for the assessment or reassessment of any income chargeable to tax subject to sections 148 to 153 of the Act, if the assessing officer has reason to believe that such an income has escaped assessment for any assessment year. Mr.Pardiwalla stated that this Court and the Hon'ble Supreme Court in a number of cases have held that "reason to believe" postulates that a bonafide belief that income has escaped assessment and must be founded on material which is not irrelevant or arbitrary.

5. The learned Counsel for the Petitioner, Mr.Pardiwalla argued that the reasons recorded did not disclose any reason to believe that income had escaped

assessment. He stated that there were three reasons recorded for the reopening of the assessment. The reasons were that firstly, the excise duty paid on inventories had not been included in the closing stock. Secondly, fraudulent invoicing by transporters had been wrongly debited to the profit and loss account and set off as bad debts and that thirdly, there was an increase in value of opening stock by applying section 145A of the Act. The learned Counsel dealt with each of these reasons separately.

6. With respect to the first issue the learned Counsel for the Petitioner submitted that as the excise duty paid on the inventories had not been debited to the profit and loss account, it could not form a part of the closing stock and as the amount was paid, it would be allowable under section 43B of the said Act and if the amount was treated as the part of the closing stock then it should have been allowed for deduction under Section 43 B. Therefore, there could be no reasons to believe that income had escaped assessment.

7. Secondly, Mr.Pardiwalla stated that the Petitioner had not claimed the amount on account of fraudulent invoicing as bad debts but had claimed as business loss as this was detected in the business year 1999-2000 and there was no hope of recovery as stated and noted in the accounts. Therefore, he submitted that there was no

material for the Respondent to believe that any income had escaped assessment.

8. In relation to the third reason, the learned Counsel for the Petitioner submitted that the issue for increase in value of opening stock by applying section 145A of the said Act was dealt with during the pendency of appellate and assessment proceedings. Hence, there was no material to believe that the income had escaped assessment. The Counsel stated that Respondent No.1 was seeking to sit in appeal over Commissioner (Appeals) order for redoing what the Appellate Authority had already done and that this was impermissible under the said Act and in excess of jurisdiction.

9. Mr.Pardiwalla further submitted that under the proviso to Section 147 of the said Act, an assessment completed under Section 143(3) of the said Act cannot be reopened after a period of 4 years from the end of the assessment year unless it is shown that the assessee had either failed to furnish his return or had not made a full and true disclosure of all material facts. He further contended that the recorded reasons for reopening stated that the discrepancies were found from the case records, which consist of documents filed by the Petitioner starting from the return of income till the completion of the assessment proceedings and upto the issue of notice u/s.148 of the Act. Hence, he

contended that there cannot be any failure on the part of the Petitioner to disclose the material facts necessary for the assessment truly and fully. He submitted that merely by stating in the recorded reasons for reopening the assessment that there was a failure to disclose fully and truly all the material facts for the assessment did not satisfy the ingredients of the provisions relating to reassessment proceedings and that the reasons recorded should have brought out what the material facts were which had not been disclosed by the assessee. With reference to the three fold reasons recorded for the reopening of the assessment, the learned Counsel claimed that all the relevant materials had been disclosed by the Petitioner. Mr.Pardiwalla contended that Respondent No.1 had accepted that there was no failure on the part of the Petitioner to disclose any fact with respect to the inclusion of the excise duty in the closing stock as Respondent No.1 in his order rejecting objections had admitted that the Petitioner had given information in the notes forming part of the accounts and in the balance-sheets and Respondent No.1 had not stated as to what further material facts were required. Therefore, the Counsel for the Petitioner submitted that the reassessment proceedings on this issue were bad in law.

10. The learned Counsel for the Respondent Mr.Vimal Gupta had submitted that the Petitioner had wrongfully

contended the fact that the Respondent had issued a notice under Section 148 of the said Act without jurisdiction and that it should be quashed and set aside as being bad in law. The learned Counsel further submitted that the Petitioners had failed to disclose material facts from the point of filing their returns of income till the completion of the assessment proceeding and up to the issue of notice under section 148 of the Act. Hence, they cannot be considered to be covered by the additional condition provided by the proviso to section 147(1) of the Act. (quote section). The learned Counsel relied upon the judgment of **Dr.Amin's Pathology Laboratory V/s.P.N.Prasad, Jt.CIT - 252 ITR 673** which stated that under explanation 1 of the proviso, merely a production of account books from which material evidence could have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the proviso. Therefore mere production of the Balance Sheet, Profit and Loss Accounts or account books will not necessarily amount to disclosure within the meaning of the proviso. In view of this judgment, the learned Counsel for the Revenue submits that the contention of the Petitioner that when the discrepancies are found from the record, there cannot be any failure on part of the Petitioner to disclose the facts cannot be held to be correct.

11. It was submitted by the learned Counsel Mr.Gupta

that the phrase 'reason to believe' could not mean that the Assessing Officer should have finally ascertained the facts by legal evidence. It only implied that he formed a belief from his examination and from any information he received. The sufficiency or correctness of this material was not to be considered at this stage. The learned Counsel for Revenue also cited Supreme Court judgments to substantiate this argument. The notes of the Petitioner were initially accepted by the Respondent which implies that the disclosure was made complete on being accepted by the Respondent. We do not see any reason why the Petitioner should not be protected by the statutory provision of the proviso to section 147 of the Act.

12. The learned Counsel for the Petitioner Mr.Pardiwalla contended that under proviso to section 151(1) of the Act, the Commissioner of Income Tax had to be satisfied on the reasons recorded by the Assessing Officer that it was a fit case for the issue of notice under Section 148. It was also submitted that the satisfaction granted was not applying the mind to the case records as a bare perusal of the assessment proceedings, assessment order, appellate order showed that all the material facts were not only duly disclosed but were also inquired into during the original assessment and also by the audit wing by the department and hence the notice u/s.148 issued which was based on

such mechanical sanction ought to be quashed and set aside.

13. Mr.Pardiwalla further submitted that reopening of certain issues had already been inquired into by the Assessing Officer during the course of assessment proceedings and an attempt to do so again on the same facts after a period of 4 years would amount to change of opinion which was impermissible and bad in law.

14. Refuting the contention made by the Petitioner that there was no reason to believe that the petitioner had escaped assessment, the learned Counsel for the Respondent had submitted that as per the amended provisions of section 145A of the Income Tax Act, the assessee is required to include the excise duty actually paid or incurred and to bring the goods to the place of its location and condition as on the date of valuation. The learned counsel for Respondent further submitted in light of this provision that the assessee had not included excise duty paid of Rs.7.92 crores on finished goods forming part of losing stock. The learned Counsel for Revenue had submitted that since the value of the closing stock had full bearing on deducing the amount of profit, failure to include this amount gave the Respondent sufficient reason to believe that the income to the extent of Rs.7.92 crores had escaped assessment. The learned Counsel had further submitted that there is

no precondition that the amount of tax, duty or cess paid or incurred is first debited to the profit and loss account and then the same amount be included in closing stock inventory. Hence, not allowing the deduction of the amount paid as excise duty under section 43B, the Respondent believed that there was an escape of assessment to the extent of Rs.7.92 crores.

15. The learned Counsel for Revenue also submitted that the Petitioner's claim of detection of fraudulent invoices and bad debts in the same Assessment Year also gave rise to the belief that there was an escape of assessment. He further contended that the assessee's recovery of Rs.59,88,694/- and the fact that the irrevocable part amounting to Rs.5,26,03,000/- had been written off and debited to the Profit and Loss account under the heading of "Establishment and Other Expenses" as defalcation is incorrect. The learned Counsel for the Revenue contended that the fact being that the assessee had already debited the amount for the respective years for the transportation bills which were found to be fraudulent.

16. The learned Counsel for Revenue went on to submit that the assessee had already availed off the deduction of expenditure which were never incurred for the purpose of business and hence this amount of Rs.5,26,03,000/- should have been credited to Profit and Loss account

rather than debited. Instead the assessee had later claimed defalcation of Rs.4,29,98,694 which as per the Petitioner, amounts to double deduction for the same amount. This, as submitted by the learned Counsel certainly lead the Respondent to believe that the income of Petitioner had escaped assessment.

17. After hearing both sides, and after perusal of all the relevant orders, we find that the Petitioner had disclosed all the material facts and there is no failure to disclose fully and truly all material facts, and therefore, reopening of the assessment beyond four years from the end of the relevant assessment year cannot be sustained.

18. With respect to the valuation opening stock read with Section 145A, the Assessing Officer on his order had denied the benefit of increase in value of opening stock which was further carried in Appeal upto the Tribunal stage where the stand of the department had been accepted. The additions made during the assessment proceedings had been upheld by the Tribunal. Thus, there could not be any failure on part of the Petitioner resulting in escapement of income. From the above there was no failure on the part of the Petitioner to disclose any material facts and hence the impugned notice u/s.148 dated 13th March, 2006 and order rejecting the objections dated 9th November, 2006 cannot be sustained.

19. As per the new provisions of Section 145A of the IT ACT, 1961, the unutilised MODVAT credit had to be included in the closing stock of raw material and work in progress, whereas the excise duty paid on unsold finished goods had to be included in the inventory of finished goods. Therefore, the decision of the CIT (A) and the subsequent decision of the Tribunal reversing the decision of the CIT (A) were only related to unutilised MODVAT credit.

20. Under the aforesaid facts and circumstances, we fail to see any ground for reopening of the assessment for the Assessment Year 1999-2000 since the Petitioner had very meticulously specified all the disclosures that were made in that Assessment Year. The reasons given by the Department for reopening the assessment under Section 148 of the Act do not disclose any failure on the part of the assessee to disclose fully and truly all material facts. Hence we hold in favour of the Petitioner on this ground. Moreover the Respondent had once held the notes in the balance sheet of the Petitioner to be a full and true disclosure but subsequently chose to alter their view.

21. For all the above reasons, rule is made absolute in terms of prayer clause (a) with costs.

(J . P . DEVADHAR, J .)

(DR . S . RADHAKRISHNAN, J .)